

ORDERED.

Dated: October 05, 2020



Catherine Peek McEwen
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION
www.flmb.uscourts.gov

In re:

Chapter 7

Frank Greer,

Case No. 8:19-ap-03711-CPM

Debtor.

Frank Greer,

Plaintiff,

v.

Adv. Proc. No. 8:20-ap-00033-CPM

Select Portfolio Servicing, Inc.,

Defendant.

**ORDER ON: 1) MOTION FOR CLARIFICATION OF DISMISSAL ORDER AND
2) MOTION FOR RECONSIDERATION AND RESTATEMENT OF PROCEEDING**

THIS PROCEEDING came on for consideration of the Plaintiff's Motion for Clarification and Opinion on Order Dismissing Adversary Proceeding (Doc. No. 23), the Plaintiff's Motion for Reconsideration and Reinstatement of Adversary Proceeding (Doc. No. 24) (together, the "Motions"), and the Defendant's response thereto (Doc. No. 25).

In the Motions, the Plaintiff requests a written opinion explaining the basis for the Court's Order Granting Motion to Dismiss Adversary Proceeding (the "Dismissal Order") (Doc. No. 20). In support of this request, the Plaintiff argues that the grounds for dismissal raised in

the Defendant's Motion to Dismiss Debtor's Adversary Complaint (the "Motion to Dismiss") (Doc. No. 6) were "frivolous" and that the Court improperly relied on other grounds (outside the Motion to Dismiss) to dismiss this proceeding. Alternatively, the Motions seek to have the Dismissal Order vacated and this proceeding reinstated based upon assertions that the Court misapplied the law and upon ludicrous and wholly unsupported allegations of judicial misconduct by this Court.

Grounds for Dismissal

At the hearing on the Motion to Dismiss held on July 13, 2020, the Court carefully and thoroughly explained to the Plaintiff the three primary grounds for dismissal upon which the Court relied. First, Counts II, III, and VII of the complaint all hinge on whether HSBC Bank, N.A. ("HSBC"), for which the Defendant is the servicer of a mortgage loan between HSBC and the Plaintiff, properly obtained a final foreclosure judgment against the Plaintiff. The Plaintiff has already litigated in state court HSBC's right to foreclose its lien on the Plaintiff's property. Therefore, these causes of action are barred by the legal principles of res judicata and/or collateral estoppel. Res judicata, or "claim preclusion," bars a party from relitigating the same claim, i.e., a claim based on the same thing (here, a residential mortgage), seeking the same relief, and involving the same parties or parties with identical interests, when that claim has previously been litigated and disposed of on the merits.¹ Collateral estoppel, or "issue preclusion," bars a party from relitigating the same factual issue, i.e., an issue identical to one previously decided where the issue was actually litigated, the issue was a critical and necessary part of the prior judgment, and the standard of proof in the prior action was at least as stringent

¹ *Beepot v. J.P. Morgan Chase Nat. Corp. Svc., Inc.*, 57 F. Supp. 3d 1358, 1369-70 (M.D. Fla. 2014) (citations omitted). "The policy underlying res judicata is that if a matter has already been decided, the petitioner has already had his or her day in court, and for purposes of judicial economy, that matter generally will not be reexamined against in any court (except, of course, for appeals by right)." *Id.* at 1370 (citations omitted).

as that in the later case.² Because the Plaintiff had his day in court as to HSBC's right to foreclose its lien on the Plaintiff's property, the Plaintiff does not get "a second bite at the apple."³ The Defendant squarely raised res judicata and collateral estoppel in its Motion to Dismiss.⁴ Thus, despite contrary allegations made in the Motions, these grounds were neither "frivolous" nor beyond the scope of the Motion to Dismiss.

Second, Counts I, IV, and V of the complaint are based on allegations related to prepetition conduct. Consequently, these causes of action — which the Plaintiff neither scheduled nor attempted to exempt in his bankruptcy filings — belong to the chapter 7 trustee in the Plaintiff's underlying bankruptcy case. Therefore, only the trustee, and not the Plaintiff, has standing to bring these causes of action.⁵ Absent standing, a court lacks subject matter jurisdiction.⁶ And although the Defendant did not raise this ground in its Motion to Dismiss, "[i]f the parties do not raise the question of jurisdiction, it is the *duty* of the federal court to determine the matter sua sponte."⁷ When a federal court concludes that it lacks subject matter jurisdiction, dismissal is mandatory.⁸ Hence, this Court had no choice but to dismiss Counts I, IV, and V once the Court realized that the Plaintiff lacked standing to bring these causes of action.

² *St. Laurent, II v. Ambrose*, 991 F.2d 672, 675-76 (11th Cir. 1993). Collateral estoppel applies where the party against whom a prior decision is asserted had a "full and fair opportunity" to litigate the issue in the prior case. *Id.* at 675.

³ *Ragsdale v. Rubbermaid, Inc.*, 193 F.3d 1235, 1240 (11th Cir. 1999). The Motions incorrectly state that res judicata and collateral estoppel do not apply in a case under appeal. However, as accurately noted in the Motion to Dismiss, it is only the *Rooker-Feldman* doctrine that does not apply when an appeal remains pending. *Beepot*, *supra* at 1369.

⁴ Defendant's Motion to Dismiss Debtor's Adversary Complaint (Doc. No. 6, pp. 7-9).

⁵ *Slater v. U.S. Steel Corp.*, 871 F.3d 1174, 1180 (11th Cir. 2017) (chapter 7 debtor forfeits his prepetition assets, including prepetition civil claims, to the estate, and only the chapter 7 trustee has standing to pursue such claims).

⁶ See *McGee v. Solicitor Gen. of Richmond County, Ga.*, 727 F.3d 1322, 1326 (11th Cir. 2013) (citation omitted).

⁷ *Fitzgerald v. Seaboard System R.R., Inc.*, 760 F.2d 1249, 1251 (11th Cir. 1985) (citations omitted) (emphasis added).

⁸ *Arbaugh v. Y & H Corp.*, 126 S. Ct. 1235, 1244 (2006).

Lastly, Count VI of the complaint alleges a post-petition violation of the Real Estate Settlement Procedures Act (“RESPA”).⁹ The Court lacks subject matter jurisdiction to consider this claim, too, because “the bankruptcy court’s jurisdiction is limited solely to cases under Title 11 and proceedings *arising under* Title 11 and *arising in or related to* cases under Title 11,”¹⁰ In other words, bankruptcy courts have jurisdiction over:

- (i) causes of action “created by title 11” of the Bankruptcy Code;
- (ii) causes of action “related to the bankruptcy case that could alter the debtor’s rights, liabilities, options, or freedom of action . . . and *which in any way impacts upon the handling and administration of the bankruptcy case;*” and
- (iii) “administrative matters within the bankruptcy case that could not have been the subject of a lawsuit absent the filing of the bankruptcy case.”¹¹

Post-petition RESPA claims in a chapter 7 case fall into none of these categories.¹² And as noted above, once the Court became aware that it lacked subject matter jurisdiction, the Court was required by law to dismiss Count VI as well. Because the Dismissal Order is “without prejudice,” the Plaintiff may bring his RESPA claim, as well as claims to set aside HSBC’s foreclosure judgment, if at all, in a court of competent jurisdiction, which is not this Court.

Denial of Request to Vacate Dismissal Order

In support of the Plaintiff’s request to vacate the Dismissal Order, the Plaintiff asserts in the Motions that the Court cannot dismiss the complaint for lack of jurisdiction because the Court previously entered an order (Doc. No. 14) denying the Plaintiff’s Amended Motion to Change Venue (Doc. No. 9). The Plaintiff, however, misapprehends the distinction between the concepts of jurisdiction and venue. Jurisdiction, on the one hand, governs a court’s *authority* to

⁹ 12 U.S.C. §§ 2601 et seq.

¹⁰ *In re Tomasevic*, 279 B.R. 358, 361 (Bankr. M.D. Fla. 2002) (citing 28 U.S.C. § 1334) (emphasis added).

¹¹ *Id.* at 362 (citations omitted) (emphasis added).

¹² *Id.* at 362 (bankruptcy court lacks even “related to” jurisdiction over alleged post-petition RESPA violations.)

hear and determine a case or cause of action. Venue, on the other hand, as it relates to bankruptcy, governs whether a particular district court is the appropriate court, based on its *location*, in which to commence a case or claim under title 11.¹³ Generally speaking, a case under title 11 may be commenced in the district where the “domicile, residence, principal place of business . . . or principal assets . . . of the person or entity that is the subject of the case have been located [for the 180-day period immediately preceding the filing].”¹⁴ And proceedings of the type brought by the Plaintiff in this adversary proceeding may be commenced in the district where the related case under title 11 is pending.¹⁵ Consequently, this Court is the proper venue for filing the complaint. However, proper venue (i.e., location) does not equate to the Court’s jurisdiction (i.e., authority) to hear any or all of the counts included in a complaint.

As to the Plaintiff’s citation to Rule 60(d)(3) of the Federal Rules of Civil Procedure (applicable here under Rule 9024, Federal Rules of Bankruptcy Procedure), as grounds to reconsider the Dismissal Order, this provision authorizes a court to set aside a judgment based on “fraud on the court.” In support of this argument, the Plaintiff attacks the Court’s rulings by describing them as “malicious,” contrary to prior rulings (namely, the order denying change of venue), and an abuse of discretion, and he accuses the Court of engaging in judicial corruption, obstruction of justice, retaliation, fraud, and bribery. The standard of proof to establish “fraud on the court” under Rule 60(d)(3) is clear and convincing evidence.¹⁶ Yet the Plaintiff fails to describe any specific conduct, not a single act, aside from the Court’s having made rulings with

¹³ Cases under title 11 and proceedings arising under title 11 or arising in or related to a case under title 11 (“Bankruptcy Cases”) are typically transferred from the district court to the bankruptcy court within the same district pursuant to 28 U.S.C. § 157(a). *See also In re Standing Order of Reference*, Case No. 6:12-mc-00026-ACC (referring all Bankruptcy Cases filed in the United States District Court for the Middle District of Florida to the bankruptcy judges for this district).

¹⁴ 28 U.S.C. § 1408.

¹⁵ 28 U.S.C. § 1409(a).

¹⁶ *Gupta v. Walt Disney World Co.*, 2011 WL 13136612, *2 (M.D. Fla. Aug. 19, 2011) (citing *Rozier v. Ford Motor Co.*, 573 F.2d 1332, 1339 (Former 5th Cir. 1978)).

which the Plaintiff disagrees, in support of these outlandish accusations.¹⁷ These accusations against me are pure fabrication, devoid of factual support.

The Court is mindful of instruction from the Eleventh Circuit that trial judges treat pro se litigants, such as the Plaintiff, with “special care” because they “occupy a position significantly different from that occupied by litigants represented by counsel.”¹⁸ A pro se litigant, however, “has no license to harass others, clog the judicial machinery with meritless litigation, and abuse already overloaded court dockets.”¹⁹

Accordingly, it is

ORDERED:

1. The Motions are granted in part and denied in part as stated below.
2. This order provides the requested clarification and written explanation in support of the Dismissal Order.
3. The Plaintiff’s request that the Dismissal Order be vacated and this proceeding reinstated is denied.

The Clerk is directed to serve a copy of this order on the Debtor. Service upon the Defendant shall be by CM/ECF only.

¹⁷ A more detailed response to similar allegations made in the Emergency Motion to Recuse Judge, which the Plaintiff filed in his underlying bankruptcy case, can be found in the Court’s order (Doc. No. 219) denying the motion in that case.

¹⁸ See *In re Witchard*, 386 B.R. 358, 360 (Bankr. M.D. Fla. 2006) (citing *Johnson v. Pullman, Inc.*, 845 F.2d 911, 914 (11th Cir. 1988)).

¹⁹ *Ferguson v. MBank Houston, N.A.*, 808 F.2d 358, 359 (5th Cir. 1986). See also *In re Worobec*, 2019 WL 3282971, *5 (Bankr. N.D. Fla. April 19, 2019) (court may impose sanctions under 11 U.S.C. § 105 and Fed. R. Bankr. P. 9011 where debtor filed numerous papers containing baseless and unsupported arguments and allegations, often including nothing more than a regurgitation of arguments previously made, and engaged in conduct demonstrating a pattern of abuse and a clear indication of bad faith.); *Woodward v. Dicks (In re Dicks)*, 306 B.R. 700, 701 (Bankr. M.D. Fla. 2004) (“This Court has inherent authority to enjoin vexatious litigation by litigants who have settled on a course of conduct involving the repetitive filing of duplicative legal papers rearguing a position rejected a multitude of times . . . where such litigation causes needless expense to other parties, where the litigants have no objective, good-faith expectation of prevailing, and where the multiple filings place an unnecessary burden on the courts.”) (citations omitted).